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Petition for Writ of Certiorari

Brief

TABLE OF AUTHORITIES

CASES

SUPREME COURT OF THE UNITED STATES

OCTOBER 1948 TERM

No. ———

AKERS MOTOR LINES, INC.,

Petitioner

versus

R. S. NEWMAN AND GARLAND WARREN,

Respondents

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Akers Motor Lines, Inc., naming as respondents R. S. Newman and Garland Warren, respectfully shows:

STATEMENT OF MATTER INVOLVED

Mrs. S. C. Reese, a Georgia resident, instituted an action in the Superior Court of Fulton County, Georgia, against Akers Motor Lines, Inc., a North Carolina corporation, for personal injuries sustained in a collision between an auto-

mobile driven by her and a tractor-trailer unit driven by one Garland Warren, allegedly while acting within the scope of his employment as an agent and servant of Akers Motor Lines, Inc. (R. 3, 4). The amount involved being in excess of $3,000.00 and diversity of citizenship appearing, the case was removed to the United States District Court for the Northern District of Georgia (Atlanta Division) (R. 2). Before service of its answer, Akers Motor Lines, Inc., moved for an order permitting it to file a third-party complaint, naming Garland Warren, the tractor-trailer driver, and R. S. Newman as third-party defendants (R. 12), which motion was allowed (R. 12). Both the third-party defendants were residents of Georgia. As amended, the third-party complaint alleged that Garland Warren was not acting under the direction and control of Akers Motor Lines, Inc., as its agent, servant and employee at the time of the occurrence but was either on a personal mission or was employed, directed in his activities, supervised, etc., by third-party defendant, R. S. Newman, who was the owner of the tractor-trailer being driven by Warren (R. 13, 15). The prayer of the third-party complaint as amended was:

> "Wherefore, Akers Motor Lines demands that whatever judgment plaintiff recovers, if any, be awarded against third-party defendant Garland Warren and/or the third-party defendant R. S. Newman as the evidence may authorize and not against defendant, Akers Motor Lines, Inc., *or*, if against Akers Motor Lines, Inc., also against third-party defendant Garland Warren and/or third-party defendant R. S. Newman as the evidence may authorize, *and that Akers Motor Lines, Inc., have judgment against R. S. Newman and Garland Warren for any sum that may be recovered against it by plaintiff, Mrs. S. C. Reese.*" (R. 15) (emphasis supplied)

Third-party defendants moved to dismiss the third-party complaint (R. 17). The District Court sustained the motion to dismiss (R. 19). The case was appealed to the United States Circuit Court of Appeals for the Fifth Circuit

where it was affirmed on June 30, 1948. A petition for rehearing was filed by Akers Motor Lines, Inc., July 21, 1948 (R. 32) and denied August 3, 1948 (R. 38). This petition for writ of certiorari is filed within three months thereafter.

JURISDICTIONAL STATEMENT

This Court is asked to exercise its discretion to assume jurisdiction under 28 U.S.C.A., § 347(a) to construe Rule 14(a) of the Rules of Civil Procedure (following 28 U.S.C.A., § 723(c)) in view of the importance of this procedural rule and the conflict of the decisions of Circuit Courts of Appeal as shown under "reasons for granting writ."

QUESTION PRESENTED

Where, in a suit brought by a resident defendant against a non-resident, a case is removed from a State Court to a United States District Court because of diversity of citizenship and the amount involved exceeds Three Thousand Dollars, exclusive of interest and cost, and where the defendant, as a third-party plaintiff, pursuant to leave granted before filing answer, causes a third-party complaint to be served upon resident third-party defendants alleging that they, and not the defendant and third-party plaintiff, are responsible to the plaintiff and not only tenders these parties to the plaintiff but demands a judgment over against the plaintiff for indemnity in the event defendant and third-party plaintiff is held liable, and where the law of the state where the cause of action arose and the case is pending recognizes the right of indemnity under the circumstances involved, is the third-party complaint subject to dismissal because the United States District Court is without jurisdiction by reason of the common citizenship of the plaintiff and the third-party defendants?

REASONS FOR GRANTING WRIT

1. The decision of the Fifth Circuit Court of Appeals in the instant case (R. 28) held that the third-party complaint should be dismissed for lack of jurisdiction. The United States Circuit Court of Appeals for the 3rd Circuit in a decision in the case of *Sheppard* v. *Atlantic States Gas Company of Pennsylvania, Inc.* (Pennsylvania R. Co., et al., Third-Party Defendants), 167 Fed. (2nd) 841 in advance sheet of June 21, 1948, reached a different result on basically the same factual situation.

2. The United States Circuit Court of Appeals for the Fifth Circuit, by its decision, has denied relief in this case to Petitioner, as the alleged master, for indemnity to which it is entitled against its alleged servant (should petitioner be held liable). Since the negligence charged to petitioner is entirely derivative and no element of joint positive wrongdoing is involved, the Georgia law as to its right is clear. See:

Central of Georgia Ry Co. v. *Macon Railway and Light Company,* 9 Ga. App. 628, 631, 632, 71 S. E. 1076, 1079, 1080 (1911)

Central of Georgia Railway Company v. *Macon Railway and Light Company,* 140 Ga. 309, 78 S. E. 931 (1913)

Georgia Power Co. v. *Banning Cotton Mills,* 42 Ga. App. 671, 157 S. E. 525 (1930)

Advanced Refrigeration, Inc. v. *United Motors Service, Inc.,* 69 Ga. App. 783, 26 S. E. (2nd) 789 (1943)

George A. Hormel & Co. v. *General Motors Truck Co.,* 55 Ga. App. 476, 190 S. E. 415 (1937)

3. The question presented in the instant case, involving the rights of a defendant to bring in third-party defendants under Rule 14 (a) of the Rules of Civil Procedure is an important question of Federal procedural law which has not been, but should be, settled by this Court.

4. The United States Circuit Court of Appeals for the Fifth Circuit, in the instant case, by reaching a decision exactly contrary to the conclusion reached by that Court in the case of *Williams et al* v. *Keyes et al,* 125 Fed. (2d) 208 (certiorari denied 316 U. S. 699, 62 S. Ct. 1297, 86 L. Ed. 1768), where the citizenship of the parties with respect to diversity was identical and the only distinguishing feature was that the *Williams* case involved contract law and the instant case involved tort law, has so far departed from the accepted and usual course of judicial proceedings on an important procedural matter as to call for an exercise of this court's power of supervision.

PETITION FOR REHEARING IN COURT BELOW RAISED SAME QUESTIONS AS THIS PETITION

The petition for rehearing filed in the court below brought to the attention of that Court the reasons herein assigned for the granting of the writ of certiorari and asked for rehearing on account thereof. (R. 32-37).

WHEREFORE, petitioner prays that this its petition for writ of certiorari be granted and that upon a consideration of the cause by this court that the judgment of the court below be reversed.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PART I—FACTS

These are sufficiently shown in "Statement of Matter Involved" division of the petition for writ of certiorari.

PART II—ARGUMENT

The importance of the application of Rule 14 (a) is so obvious that it will not be argued except to say that the same situation arises almost daily and the circuit courts have reached different conclusions with respect to the proper application of the rule. This Court's power of supervision for the purpose of harmonizing these decisions is, of course, most desirable.

In the instant case, at the time of removal, the cause stood bona fide as one between a resident plaintiff and a non-resident defendant. Federal jurisdiction was thus shown and the fact that residents were brought in as third-party defendants, subsequent to removal, should not divest the Federal court of jurisdiction. The Fifth Circuit agreed with this in the case of *Williams et al* v. *Keyes et al*, 125 Fed. (2d) 208, 209, in the following language:

> "At the time of removal, the cause stood bona fide as one between resident plaintiffs and a single non-resident defendant. Federal jurisdiction was then shown, and the fact that citizens of Florida were brought in as third-party defendants subsequent to removal did not divest the Federal court of jurisdiction."

This court denied certiorari in the *Williams* case (316 U. S. 699, 62 S. Ct. 1297, 86 L. Ed. 1768).

Where the factual situation with respect to diversity was the same, the United States Circuit Court of Appeals for the Third Circuit in the case of *Sheppard* v. *Atlantic States Gas Company of Pennsylvania, Inc.* (Pennsylvania R. Co.,

et al., Third-Party Defendants), 167 Fed. (2nd) 841, held that the court had jurisdiction of a third-party complaint:

> "Rule 82 of the Federal Rules does provide that 'These rules shall not be construed to extend * * * the jurisdiction of the district courts of the United States.' However, in connection with this fundamental doctrine it is to be remembered that the type of third-party suit under consideration is ancillary to the main action and presupposes that the latter has met the jurisdictional diversity requirements. Williams v. Keyes, 5 Cir. 125 F. 2d 208, certiorari denied 316 U. S. 699, 62 S. Ct. 1297, 86 L. Ed. 1768, and see cases collected 1 Moore's Federal Practice 1947 Supplement 378. Therefore, at least within the present facts where the plaintiff seeks no recovery against the third-party defendants, we think the inclusion of the third-party claim is justified though it does not of itself meet the diversity test. We base this not on any theory of extension of jurisdiction but in order to effectively dispose of the entire related litigation in the suit which is already properly before the court and thus carry out the purpose of Rule 14. 1 Moore's Federal Practice 782. 'Obviously a mere broadening of the content of a single federal action must not be confused with the extension of federal power.' Lesnik v. Public Industrials Corporation, 2 Cir., 144 F. 2d 968, 973."

If defendant and third-party plaintiff be held liable by reason of the allegations (and proof in support thereof) of the plaintiff's petition, then, under the Georgia law, the negligence being entirely derivative (R. 6, 7), it would be entitled to a judgment over in indemnity against its servant, Garland Warren. The leading case in Georgia on this matter is *Central of Georgia Ry. Co.* v. *Macon Railway and Light Company*, 9 Ga. App. 628, 631, 632, 71 S. E. 1076, 1079, 1080 (1911), where the court stated:

> "The duty to indemnify may arise from relationship either contractual or non-contractual—express or implied agreements to indemnify, or may arise from operation of law independently of contract."

In discussing the general rule that contribution may not be enforced between joint, concurring wrongdoers who were not sued jointly, the court said:

> "But there may be cases in which a person who has suffered loss or damage may have the right to sue two persons as if they were joint wrong-doers, without their being, as among themselves, joint wrong-doers. A's servant, B, negligently injures C in the performance of A's work. From C's standpoint, A and B are joint wrong-doers, but as among themselves B is joint wrong-doer and A is subjected to liability merely by the doctrine of respondeat superior; so that, if C sues A alone and compels him to pay the damage, A, in turn, may compel B to indemnify him for the loss. So in this class of cases it is always relevant to inquire, 'Whose wrong really caused the damage?' "

See also:

Central of Georgia Railway Company v. *Macon Railway and Light Company*, 140 Ga. 309, 78 S. E. 931 (1913)

Georgia Power Co. v. *Banning Cotton Mills*, 42 Ga. App. 671, 157 S. E. 525 (1930)

Advanced Refrigeration, Inc. v. *United Motors Service Inc.*, 69 Ga. App. 783, 26 S. E. 2nd 789 (1943)

George A. Hormel & Co. v. *General Motors Truck Co.*, 55 Ga. App. 476, 190 S. E. 415 (1937)

If the third-party complaint in the instant case be ancillary it is unimportant that there is no diversity of citizenship as between the plaintiff and the third-party defendants. If the third-party complaint in the instant case be construed as an independent claim arising out of the same transaction, then diversity of citizenship does exist as between the third-party plaintiff and the third-party defendants and there would be no basis for the court's denial of jurisdiction.

In conclusion, it is respectfully submitted that the decision of the court below in the instant case was such as to defeat the intent and purpose of the Rules of Civil Procedure as expressed in Rule 1:

"They shall be construed to secure the just, speedy, and inexpensive determination of every action."

The effect of the decision in the instant case is to require two trials of the same cause, which is neither just, speedy, nor inexpensive.

Respectfully submitted
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